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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 390

ROYAL M. BROADY,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The memorandum opinion of the District Court (R. 42-52)* is unreported.

The opinion of the Court of Appeals (Tr. 3) is reported at 191 F. 2d 73.

JURISDICTION.

Petitioner claims his action arises under the Railway Act 45 U. S. C. Section 151 *et seq.* and invokes the jurisdiction of this Court under 28 U. S. C. Section 1254 (1). Respondent contends that petitioner's claim, as held by the Court of Appeals (191 F. 2d at 76) is bottomed on the terms of a bargaining contract, not on a federal statute, and that the District Court was without jurisdiction.

* Respondent, like petitioner, will refer to the printed record in the Court of Appeals as "R" and to the transcript of proceedings in the Court of Appeals as "Tr.".

QUESTIONS PRESENTED.

The ultimate questions presented are:

1. Does the Railway Labor Act prescribe, apply to or control the procedure at an investigation conducted for the purpose of determining whether an employee of a railroad carrier is to be disciplined?

2. May a railroad carrier and its employees, through their respective representatives, in negotiating a collective bargaining contract granting to an employee a right to an investigation before dismissal, agree upon a binding and enforceable restriction to his co-employees of representation at the investigation hearing?

3. Does an action for alleged violation of rights arising not out of the Railway Labor Act, but out of the terms of a collective agreement, absent diversity of citizenship, present a justiciable controversy?

STATUTE INVOLVED.

Railway Labor Act, 45 U. S. C. Section 151 *et seq.* The pertinent provisions are set forth at pages 10-11 in appendix to petition.

STATEMENT OF THE CASE.

This litigation concerns the application, if any, of the Railway Labor Act to a disciplinary hearing at company level and to the procedure followed in the conduct of same. The parties hereto are residents and citizens of the State of Illinois. Royal M. Broady, the petitioner, is a former employee of the respondent, Illinois Central Railroad Company, carrier-employer. His work was that of a dining car waiter in interstate commerce, and the employment relationship falls within the purview of the Railway Labor Act, 45 U. S. C. Section 151 *et seq.* In September, 1947, after charges of violation of certain company rules were lodged against him, a disciplinary hearing was conducted by company officials, which resulted in his discharge.

An investigation or hearing of the kind with which this case is concerned is a proceeding conducted by the carrier-employer for the purpose of developing the facts from which may be determined whether and in what manner an employee has violated rules or instructions governing his conduct as an employee, and also whether discipline is to be imposed upon the employee, and if so, of what character and degree. Such an investigation is conducted by a qualified officer of the company, and statements of the witnesses are received ordinarily in question-and-answer form. Each employee charged with a rule violation is given his opportunity not only to be present in person, but also to be represented by some individual qualified under the applicable agreement to act in that capacity.

Investigations of this character, when required as a preliminary to and as the foundation of the imposition of

discipline, are provided for solely in the collective bargaining agreements—not in the Railway Labor Act. In the case of this plaintiff, the applicable agreement is that with the Dining Car Employees' Union, Local 351, Defendant's Exhibit No. 4 (R. 39-41). These investigations are governed entirely by the provisions of such agreements. They are required only when there is an agreement covering the employee under charges, and then only when the agreement specifically so provides.

In 1936 the services of the National Mediation Board were invoked pursuant to Section 2 Ninth of the Railway Labor Act (45 U. S. C., Section 152 Ninth), to settle a dispute as to who may properly represent dining car cooks, waiters, waiters in charge and buffet attendants, employees of the Illinois Central Railroad Company. Under date of February 4, 1937, that Board issued its certificate certifying that Dining Car Employees' Union, Local 351, of Chicago, Illinois, had been duly designated and authorized to represent the dining car cooks, waiters, waiters in charge and buffet attendants for the purpose of the Railway Labor Act (R. 17, Def. Ex. 3, R. 38).

Thereafter a collective bargaining agreement was negotiated between the Dining Car Employees' Union, Local 351, as the statutory representative of plaintiff's craft, and the Illinois Central Railroad Company. This agreement was effective November 16, 1937, as to rates of pay; December 1, 1937, as to pay rules; and December 18, 1937, as to years of service, seniority and other rules (R. 18, Def. Ex. 4, R. 38-41). Article 25 with reference to Discipline provided for an investigation or hearing as to any charges made, before dismissal or other disciplinary action. Sections (d) and (e) of Article 25 (R. 40-41) provided:

> "(d) Employees shall have the right to be present and may arrange, at their expense, to have an *em-*

*ployee** of their choice at hearings or investigations to hear the testimony, who may ask questions of the witnesses to bring out facts pertinent to the case. Employees shall also have the right to have present, at their expense, such witnesses as they desire to give testimony.

"(e) In case of censure, discipline or dismissal the employee or his representative may appeal to the Manager of Personnel or other officer designated by the Company, if he so desires, and if in case of dismissal it is found unjust, the employee shall be reinstated and paid for all time lost."

The charges against petitioner were occasioned by an altercation he had September 14, 1947, with certain passengers of respondent who were riding in the dining car and whom the petitioner refused to serve. The facts concerning notice, appearance of petitioner at the time and place scheduled for inquiry into validity of the charges, his claim of a right to be represented by certain individuals who accompanied him and who were not fellow employees, but officers of a labor organization other than the statutory collective bargaining representative (R. 11-12) sufficiently appear in the Petition at pages 3 and 4 and will not be here repeated. Upon the refusal of respondent to permit these individuals to represent petitioner, he declined to participate in the hearing and investigation which then proceeded in his absence. The following day, September 24, 1947, respondent addressed a letter to petitioner, advising him that he was discharged (Defendant's Exhibit 2, R. 37).

Since receipt of this letter petitioner has not been in the employ of respondent (R. 13). After receipt thereof he did participate in further meetings or conferences with a representative of the railroad, the next conference being with an attorney for the respondent, at which time he was

* All italics ours, except where otherwise indicated.

accompanied by Mr. Rothstein, an attorney, and the two union officials who appeared with him at the disciplinary hearing (R. 12-13). The record does not show that petitioner was suspended at any time prior to his discharge. No appeal was prosecuted by petitioner to the respondent's manager of personnel as authorized by Section (e) of Article 25 of the Collective Bargaining Agreement (Opinion 191 F. 2d 76), nor did he seek an adjudication of his alleged grievance because of his discharge and loss of seniority rights before the Adjustment Board as provided for in the Railway Labor Act, Section 153 First (i).

Petitioner brought this action based upon the Railway Labor Act for alleged wrongful discharge. He asked for reinstatement, restoration of seniority rights and lost wages. In a non-jury trial the District Court held petitioner had a statutory right to designate a representative of his own choosing, other than a co-employee, to represent him at a company disciplinary hearing,—a right denied him. Judgment was entered against the respondent for $9,224.67 and costs. On appeal the Court of Appeals held that the District Court was without jurisdiction, reversed the judgment and ordered the cause remanded with directions to dismiss the complaint.

ARGUMENT.

The issue in this case is an extremely simple one, and no amount of strained semantics can convert it into one warranting review by this court on certiorari. It presents a dispute as to whether there was a denial of petitioner's alleged *statutory* right to have his designated representative act for him at a disciplinary hearing at company level.

Petitioner claimed his statutory right to a representative of his own choice at such hearing under the Railway Labor Act. Respondent claims that the said statute does not give the petitioner such right; that his right to representation at, or for that matter his right to have a hearing of any character whatsoever before discharge is not an inherent right. It did not exist at common law. It was not created by the Railway Labor Act and there is no foundation for it in the contract of employment. It is the respondent's contention that the right to any disciplinary investigation at company level and before discharge was created by and rests solely upon the Collective Bargaining Agreement between the respondent company and Dining Car Employees' Union, Local 351, as the representative under the Railway Labor Act of the petitioner's craft.

I.

The Decision of the Court of Appeals is Clearly Correct.

The District Court decided (memo. op. R. 51) that under the Railway Labor Act the petitioner has a *statutory* right to a representative of his own choosing and that respondent violated that Act when it restricted the petitioner in the

choice of his representation to those who were employees of the respondent.

In support of its decision the said court quoted the following sections from the Railway Labor Act, 45 U. S. C. 151-163: Section 151 Sixth; Section 151 (a) (cited in the opinion as Section 152); Section 152 Second; Section 152 Third; Section 152 Eighth; and the decision of the United States Supreme Court in *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U. S. 711; affirmed on rehearing, 327 U. S. 661.

Neither in the findings of fact (R. 52), conclusions of law (R. 54), nor in the memorandum opinion did the Trial Court point out any specific language or any particular section of the Act which supports the court's conclusion that there is such a *statutory* right to unrestricted choice of representation at a company disciplinary hearing. The obvious reason for this is that there is no such right. This was one of the principal, if not the controlling issue in the case, and the fact that the Court of Appeals considered that issue and correctly decided same is clearly evidenced in its opinion (191 F. 2d 73) at page 76, wherein it is said:

> "We can find no provision of the Railway Labor Act which gives to employees the right to a representative of their own choice at an investigation by company officials of a charge that the employee has violated company rules. In the case at bar, appellee's right to representation comes from the agreement of appellant and Dining Car Employees Union, Local 351."

It was and is the position of respondent that petitioner had no grievance until he was actually dismissed, the day after the investigation. Until then he had not even been suspended. Not only did the investigation precede the initial existence of the grievance, but in fact it was held

for the particular purpose of determining the facts; and to see whether disciplinary action would be taken which might result in a grievance. When that disciplinary action was taken on September 24, 1947, but not before that date, petitioner was in a position to assert his grievance claim, in substance that he had been unjustly discharged and therefore should be reinstated and paid for time lost. In considering this issue the court after quoting sub-paragraphs (i), (j), and (p) 45 U. S. C. 153, First, stated at page 77:

> "It appears to us under the above provisions of the Railway Labor Act that the employee's right to representation thereunder, when an investigation of a breach of company rules is involved, would arise only when the officials of the company have completed their inquiry and entered a finding unsatisfactory to the accused employee. Then, and only then, is he entitled under the Act itself, to a hearing before the Adjustment Board."

Further evidencing the correctness of the decision of the Court of Appeals is the holding in *Virginian Railway Company* v. *Federation*, 300 U. S. 515, 559 (op. 191, F. 2d 73) "that the provisions of the Railway Labor Act do not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them."

In addition to thus treating and correctly deciding the basic issue of petitioner's case, the opinion further holds that because of the exclusive jurisdiction of the National Railway Adjustment Board, the District Court lacked jurisdiction in so far as petitioner sought reinstatement and back pay. This holding is based on the express terms of Section 3(i) of the Railway Labor Act and the opinions in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239 and *Order of Railway Conductors of America* v. *Southern Railway Company*, 339 U. S. 255, and is particularly applicable

here in the light of the court's necessary finding that the right to any hearing at company level is based upon the collective bargaining contract rather than the terms of the statute.

The court further holds that even if the suit be considered as seeking only damages for wrongful discharge, petitioner's action must be treated as arising under contract only, and in the absence of diversity of citizenship the Federal District Court would have no jurisdiction.

II.

There Is No Important Question of Federal Law.

Petitioner asserts (petn. p. 5) that the basic issue presented is clearly of importance in the administration of the Railway Labor Act. This new-born interest in the administration of the Act is refreshing, though tardy. Petitioner's actions throughout have indicated a studied purpose to avoid the machinery set up for the administration of the Act to accomplish his desires.

Petitioner further states "whether an employee with a personal grievance has the right to confer with the carrier through a representative of his own choice is a question which goes to the very heart of employee rights," but there is no issue in this case as to the right of petitioner to confer with the respondent carrier. The respondent never questioned that right and that right was not denied petitioner (R. 12-13). As to personal grievance, the petitioner had no grievance until his discharge.

So much has been said in decisions under the Railway Labor Act about its exclusive applicability to railroad labor controversies that it is understandable why the trial court tried to find the answer to this controversy in the provisions of that act. Admittedly the act does contain a

provision allowing an employee to have a representative of his own selection (either employee or non-employee) in a hearing before the National Railroad Adjustment Board. This right is unquestioned. But that provision is wholly inapplicable to the present litigation. First, because the hearing was not before the Adjustment Board; second, no controversy had yet arisen. The hearing was solely for the purpose of ascertaining the facts concerning the incident on the train. The result might well have been, if the facts so justified, a complete exoneration of plaintiff.

The Railway Labor Act, broad as it is in its scope, does not attempt to limit the employer's authority in investigating the conduct of his employees. Until the investigation is completed and the employer has taken some action of which the employee complains, there is no controversy under the act. That this is true, that it is so entirely proper and in accordance with immemorial custom and practice, is so obvious it is difficult to understand how it escaped the trial court's attention. Perhaps it was natural to look to the federal act for the answer. But the error lies in attempting to apply the act before any controversy arose,—to a disciplinary hearing, which, it is true, might have resulted in a controversy but had not. It is unthinkable that an employer can not conduct an investigation of an employee's conduct without outside interference. Surely the employee is amply protected if he is given the right to non-employee representation *after there has been a decision against him.* This is the protection accorded employees in every collective bargaining agreement negotiated uniformly by all the crafts. If the employees acting through their bargaining agents are satisfied, there is no occasion for courts to read something into the federal act which is not there, nor to amend the collective agreement by deleting a provision satisfactory to the representatives of every union on every railroad.

Petitioner says the importance of the issue is illustrated by the filing of briefs *amici curiae* on behalf of seventeen unions with a combined membership of over 1,600,000. Petitioner also refers to the recognition of the importance of the question by the National Mediation Board. No effort was made by the National Mediation Board to appear in the cause as *amici curia.* The fact that the briefs *amici curiae* filed in the case opposed the position taken by petitioner and represented "the great majority of railroad employees in the United States" indicates the important phase of this litigation is to make sure that nothing is read into the Railway Labor Act which is not plainly there.

III.

There Is No Conflict of Decisions.

Except for this particular case in which the Court of Appeals disagreed with the District Court, we are not aware of any conflict of decisions on the issues here presented.

In holding that the provisions of the Railway Labor Act do not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them, the decision is entirely consistent with and followed *Virginian Railway Company* v. *System Federation, No. 40,* 300 U. S. 515, and *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548.

The decision is also in harmony and complete accord with the decision of the Court of Appeals of 8th circuit in *Brooks* v. *Chicago R. I. & P. R. Co.,* 177 F. 2d 385, wherein the court said on page 391:

> "The Railway Labor Act does not empower the courts to enforce against railroads *any prescribed procedure*

for investigating and discharging its employees, nor does it empower the courts to entertain original actions to compel railroads to re-employ or give back pay to discharged employees. * * *"

Petitioner urges (petn. p. 6) that the decision ignores the opinions of this court in *Elgin J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711 (1945) affirmed on rehearing 327 U. S. 661 (1946) and is inconsistent therewith.

The *Burley* decisions did not involve a disciplinary hearing conducted by an employer. The question there was the extent of the authority of the officers of the bargaining representative to bind individuals in the adjustment and settlement of accrued individual pecuniary claims—not in a disciplinary hearing or in conference with officers of the carrier on a matter that had not as yet reached a grievance state—but in proceedings before the *National Railroad Adjustment Board.*

Petitioner says (petn., p. 7):

> "It is not without significance that the Court of Appeals failed to mention the *Burley* cases, which were argued at length by both parties and the *amici curiae.*"

It is true that respondent and *amici curiae* argued in their briefs the *Burley* cases in the Court of Appeals. The argument was that the *Burley* cases have no application to the issues in this case. The significance of the failure of the opinion to refer to the opinions in the *Burley* cases is that the Court of Appeals agreed with our arguments.

At page 8 petitioner cites *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210, and particularly page 213 thereof, reading in part:

> "* * * is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. A. Section 41(8). * * *"

In support of the argument that "Such a right to confer through a freely-chosen representative, necessarily implied from the provisions of the Railway Labor Act, is one that the federal courts have jurisdiction to protect." In the *Tunstall* case, like the case of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, on which it relies, the question was whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. The collective bargaining representatives under the Act were parties defendants (in fact the principal defendants) to the *Steele* and *Tunstall* cases. Petitioner's representative is not a party defendant here. As stated in the *Steele* case:

> "Section 3, First (i), which provides for reference to the Adjustment Board of 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements,' makes no reference to *disputes between employees and their representative.*"

The *Tunstall* case does not aid the petitioner.

Petitioner argues that *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors of America* v. *Southern Railway Co.*, 339 U. S. 255, relied upon by the Court of Appeals in holding that the District Court was without jurisdiction are not in point. But for the reasons given by that Court of Appeals in its opinion at page 78, we think they are in point.

Finally petitioner urges (p. 9) that the decision is inconsistent with *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630 (1941). This contention was urged in and considered by the Court of Appeals as is shown by the statement in the opinion at page 78:

"But it must be remembered that in the *Moore* case there was diversity of citizenship. *That was the basis of federal jurisdiction in that case.*"

Conclusion.

For the foregoing reasons it is respectfully submitted, that this petition for a writ of certiorari should be denied.

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